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Supreme Court, U.S.
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No. 98-1253

IN THE

Supreme Court of the United States

October Term, 1998

CERAMICA NUOVA D'AGOSTINO, S.p.A.,

Petitioner,

v.

MCC-MARBLE CERAMIC CENTER, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITIONER'S REPLY BRIEF

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Argument

1. A Clear Conflict Exists Between The Decisions Of The Eleventh And Fifth Circuits With Respect To The Applicability Of The Parol Evidence Rule To Contracts Governed By The CISG. This Court's Review is Warranted.

MCC argues that the Fifth Circuit's decision in *Beijing Metals & Minerals Export/Import Corp.* v. *American Business Center, Inc.*, 993 F.2d 1178 (5th Cir. 1993), purportedly "indicates that the applicability of the parol evidence rule to CISG case was taken as a given, not briefed and decided" (Br. In Opp. 5-8). MCC contends that "The Fifth Circuit and the parties in *Beijing Metals* simply assumed the applicability of the parol evidence rule" (*Id.*, at 7-8).

MCC's argument is pure supposition and conjecture. MCC's counsel nowhere claims to have reviewed the briefs and record in *Beijing Metals*, and thus is in no position to assert what was and was not litigated. Nor does the Court's terse statement in *Beijing Metals* that "the parol evidence rule...applies regardless" of whether Texas law or the CISG applied (993 F.2d 1178, N. 9) provide any support for MCC's claim that the applicability of the parol evidence rule to the CISG was simply assumed. MCC is attempting to "read into" the opinion a statement that simply isn't there. MCC cites to no judicial opinion which shares MCC's view that the applicability of the parol evidence rule to the CISG was simply assumed by the Court and parties in *Beijing Metals*.

To paraphrase the Court in *United States* v. *Delahoussaye*, 573 F.2d 910, 913 (5th Cir. 1978), the provisions of a treaty should not mean one thing in one Circuit and another elsewhere. Under the current state of affairs, parties embroiled in a contract dispute governed by the CISG in which parol evidence is proffered may expect a different outcome depending upon whether the case is heard in the Fifth or Eleventh Circuit -- hardly the "uniformity of result" desired under the CISG .[1]

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1. Respondent makes the curious argument that petitioner's contention that an irreconcilable conflict exists between the decisions of the Eleventh and Fifth Circuits

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MCC argues that "Even if the Eleventh Circuit and the Fifth Circuit were squarely in conflict on the controlling point of law, that conflict would not warrant certiorari in this case....An assumed conflict on this question of international law is less worthy of certiorari than would be a question of federal law...." (Br. In Opp. 8). MCC is mistaken.

Recognizing the potential national and international ramifications of such conflicts, this Court has granted certiorari in order to resolve divisions among the Federal Courts of Appeals with respect to the construction of international treaties (see e.g., *El Al Israel Airlines, Ltd.* v. *Tseng*, __U.S.__, 119 S. Ct. 662, 142 L.Ed.2d 576 [1999] [this Court granted certiorari where the Circuits were divided on an interpretation issue concerning the Warsaw Convention]; *Chan* v. *Korean Air Lines, Ltd.*, 490 U.S. 122 [1989]; *Air France* v. *Saks*, 470 U.S. 392, 394 [1985] ["We granted certiorari...to resolve a conflict among the Courts of Appeals as to the proper definition of the word 'accident' as used in this international air carriage treaty"]; *cf., Eastern Airlines, Inc.* v. *Floyd*, 499 U.S. 530 [1991]; *Volkswagenwerk AG v. Schlunk*, 486 U.S. 694 [1988]; *Santovincenzo* v. *Egan*, 284 U.S. 30 [1931]; *Jordan* v. *Tashiro*, 278 U.S. 123 [1928]).

This Court noted in *Japan Whaling Assn.* v. *Amer. Cetacean Soc.*, 478 U.S. 221, 230 (1986), that construing and interpreting treaties is a recurring and accepted task for the federal courts. In

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was not adequately presented for this Court's review because the argument purportedly was not fully elaborated in the petition's argument headings (Brief in Opp. 3-4). Besides being wrong on the facts, there is simply no requirement in this Court's Rules that the questions presented for consideration by this Court must be set forth in elaborate detail in the petition's captions. Indeed, this Court's Rules contain no directive whatsoever with respect to the content of the petition's captions or "argument headings". MCC nowhere disputes that petitioner fully and amply set forth the questions to be considered by this Court and the arguments in support of the grant of a writ of certiorari in the "Questions Presented" and in the body of the Petition. Indeed, MCC concedes that the conflict among the Federal Courts of Appeals is raised within the body of the petition's argument (Br. In Opp. 4).

fact, this Court has recognized that it is "[o]ur duty...to enforce the ...treaties of the United States, whatever they might be" as the "supreme law of the land" (*Air France* v. *Saks, supra*, 470 U.S. 392, 406).

Respondent asserts that since other states party to the CISG have no parol evidence rule in their domestic jurisdictions, in the interests of uniformity, this Court should deny certiorari and await further development of the law elsewhere (Br. In Opp. at pp. 8-9, 19-20).[2] That MCC's contention is misguided is clearly shown by an analysis of the principles and goals underlying the CISG.

Professor Harry M. Fletchner, in his article "*Symposium -- Ten Years of the United Nations Sales Convention: The Several Texts of the CISG in a Decentralized System: Observations on Translations, Reservations and Other Challenges to the Uniformity Principle in Article 7(1)*", 17 J.L. & Com. 187 (Spring, 1998), notes that uniformity of application is a central value of the CISG, but it is neither a rigid nor a simple mandate. Properly understood, it requires a process or methodology involving awareness of and respect for, but not blind obedience to, interpretations of the CISG from outside one's own legal culture (*Id.*, at 188). Article 7(1) provides that, in interpreting the CISG, "regard is to be had...to the need to promote uniformity in its application...." (*Id.*, at 205). Any suggestion that the uniformity principle demands that CISG decisions by the courts of one country have binding precedential effect in the courts of another country overstates the requirements of Article 7(1). Having "regard" for the need to promote uniformity does not require that a foreign decision, even an ill- conceived one, be treated as binding authority (*Id.*, at 211).

What is more, that other countries may have rejected the parol evidence rule in the context of *domestic* commercial disputes in no way makes them better able to determine whether the *CISG* contemplates application of the rule. Fletchner notes that a potential source of non-uniformity in the application of the CISG is the

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2. As discussed *infra*, research has revealed no decisions from foreign jurisdictions which directly address the issue of whether the parol evidence rule applies to the CISG.

"different background assumptions and conceptions that those charged with interpreting and applying the Convention bring to the task." (Id., at 200). He quotes from Professor John O. Honnold, who has stated:

> "The Convention...will often be applied by tribunals (judges or arbitrators) who will be intimately familiar only with their own domestic law. The tribunals, regardless of their merit, will be subject to a natural tendency to read the international rules in light of the legal ideas that have been imbedded at the core of their intellectual formation." Honnold, *Documentary History of the Uniform Law for International Sales*, p. 1 (1989).

Professors Fletchner and Honnold describe this tendency as the "homeward trend" (Fletchner, *op. cit.*, at 200).

MCC's argument that this Court should await decisions from foreign jurisdictions which do not have a parol evidence rule, and are therefore purportedly more capable than this Court of interpreting the CISG without the bias of entrenched domestic legal doctrines, ignores the fact that those judiciaries will all suffer to some extent from the "homeward trend" described by Fletchner and Honnold. Those foreign courts "will be subject to a natural tendency to read the international rules in light of the legal ideas that have been imbedded at the core of their intellectual formation" (Honnold, supra). Their jurisdictions' non-use of the parol evidence rule is as entrenched as our jurisdictions' application of the doctrine. Thus, MCC's argument that foreign jurisdictions are more suited to interpret the CISG than is this Court is devoid of merit.

While Professor Fletchner recognizes that the "homeward trend" presents a challenge to achieving uniformity in applying the Convention, he believes that challenge can be met "by sensitive, energetic and intelligent attempts to become aware of one's own preconceptions and the perspectives of those from different cultures." (Fletchner, *op. cit.*, at 204). This Court has consistently demonstrated that it is not chained to concepts of domestic law, but is fully capable of construing international treaties so as to perform its "responsibility to give the specific words of the treaty a meaning consistent with the shared expectations of the contracting parties"

(*Air France* v. *Saks, supra*, 470 U.S. at 399). This Court has not hesitated to grant certiorari in order to resolve questions concerning the interpretation of international treaties whose cardinal purpose is to achieve uniformity of rules governing disputes arising out of international transactions (see e.g., *El Al Israel Airlines, Ltd.*, v. *Tseng, supra*, 119 S. Ct. 662, 142 L.Ed.2d 576; *Eastern Airlines, Inc.* v. *Floyd, supra*, 499 U.S. 530).

To assist in the interpretation of the provisions of an international treaty to which the United States is a party, this Court will look to the treaty's text, its negotiating and drafting history, contracting states' post-ratification understanding of the treaty, and scholarly commentary (*Id.*). All of the above are present in abundance here, with but one exception.

In its decision, the Eleventh Circuit noted that "the parties have not cited us to any persuasive authority from the courts of other States party to the CISG" (144 F.3d 1384, N. 14). The Court stated that its own independent research had produced no foreign cases interpreting the CISG that address the issue of parol evidence (Id.).

CISG commentators nevertheless agree that abstention from deciding a CISG issue until foreign courts have spoken is neither necessary nor desirable. For example, Professor Franco Ferrari, in his article *Symposium--Ten Years of the United Nations Sales Convention: CISG Case Law: A New Challenge for Interpreters?*, 17 J.L. & Com. 245, 254 (Spring 1998), notes that while recourse to foreign judicial decisions interpreting the CISG has often been advocated, this creates practical difficulties. First, foreign case law cannot easily be retrieved, and even where it can be retrieved, it is often written in a language unknown to the reader.[3] Dependence

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3. Ferrari notes that the Pace University Institute of International Commercial Law has taken steps to remedy this situation by developing an Internet website found at <http://www.cisg.law.pace.edu> which provides case law from all over the world (much of it, unfortunately, untranslated) (Ferrari, *op. Cit.*, at 255). The UNCITRAL Secretariat also releases abstracts of decisions, which may be obtained from the following website: <http://www.un.or.at/_uncitral> . Another source is the UNILEX database. See John O. Honnold, *Symposium–Ten Years of the United Nations Sales Convention: the Sales Convention: From Idea to Practice*, 17 J.L. & Com. 181, 184

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upon foreign case law further requires a knowledge of the hierarchical structure of the various countries' court systems-- i.e., whether a specific court is, from a hierarchical point of view, a lower court in respect to the court of a different country. *Id.*, at 260. In both Professors Ferrari and Fletchner's opinion, foreign case law should be considered as having merely persuasive value, and should not be treated as binding or controlling precedent (Ferrari, *op. cit.* at 260; Fletchner, *op. cit.*, pp. 211-213). Thus, the fact that, to the knowledge of the parties, foreign courts have yet to address the issue at hand is no reason for this Court to deny certiorari in this case.

2. Scholarly Commentary And The Drafting History Of The Treaty Demonstrate That The Parol Evidence Rule May Be Applied Under the Convention.

MCC argues that this Court should deny certiorari because the Eleventh Circuit's decision "will likely be followed by other courts deciding the issue", since it is purportedly in line with "the weight of authority" holding that there is no parol evidence rule in the CISG (Br. In Opp. 10). To the contrary, that the issue of whether the parol evidence rule applies to the CISG is hotly disputed and is of great importance to international law and commerce is plainly demonstrated by the abundance of scholarly commentary it has generated, as shown both in the Eleventh Circuit's decision (see 144 F.3d 1384, 1390-1391) and by MCC's own papers (see Br. In Opp. 13-18).

Contrary to MCC's suggestion, scholarly writing is not one-sided on the issue of the applicability of the parol evidence rule to the CISG. See, for example, David H. Moore, *The Parol Evidence Rule and the United Nations Convention on Contracts for the International Sale of Goods: Justifying Beijing Metals & Minerals Import/Export Corp. v. American Business Center, Inc.*, 1995 Brigham Young L. Rev. 1347 . Indeed, Professor Harry M. Fletchner, whom the Eleventh Circuit recognized as an expert on the

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(Spring 1998). Thus, there are several potential sources of foreign case law interpreting the CISG to which this Court and the parties may resort should this Court determine to entertain this appeal.

CISG (see 144 F.3d 1384, n. 17), states with respect to the applicability of the parol evidence rule that:

> "The Convention has (in my opinion) little to say that is directly relevant to resolving this issue. Article 8(3) of the CISG does provide that, in interpreting the parties' intent and the meaning of an agreement, 'due consideration is to be given to all relevant circumstances of the case, including the negotiations....' Some have taken this to be a repudiation of the common law parol evidence rule. I, however, have argued that, because Article 8(3) deals only with questions of interpretation, its impact on parol evidence questions is limited." (Fletchner, *op. cit.* at 201).

Professor Fletchner's comments clearly support D'Agostino's contention, made in Point II of its petition for certiorari, that Article 8 governs only how statements, or contracts, are to be "interpreted". It should not be applied where, as here, there are no ambiguous contractual provisions to interpret.[4]

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4. It is obvious from a review of the Brief in Opposition that Respondent has not straightforwardly addressed Points II and III of the Petition for Certiorari. MCC asserts only that the affidavits it submitted to the Court below were not entirely conclusory and were not devoid of supporting facts (Br. In Opp. 1-2).

MCC contends that the alleged absence of a translation of the Italian terms on the reverse of the form is evidence which supports the conclusion that those terms were not supposed to be part of the agreement (Id.). This argument overlooks the fact that MCC's president, Mr. Monzon, a sophisticated businessman, never asked that the terms on the back of the form be translated before he signed the contract. There is nothing in the CISG to abrogate the well-established rule of law that the parties to a written agreement have a duty to learn and understand the contents of a document before signing it, and that self-imposed ignorance will not affect the liability of one who signs it. See *Paper Exp., Ltd. v. Pfankuch Maschinen GmbH*, 972 F.2d 753, 757 (7th Cir. 1992) ("We live in a global economy and contracts between parties of different nationalities, and speaking different languages, are commonplace. But a party who agrees to terms in writing without understanding or investigating those terms does so at his own peril"); *Heller Financial, Inc. v. Midwhey Powder Co., Inc.*, 883 F.2d 1286 (7th Cir. 1989); *Onderko v. Advanced Auto Ins., Inc.*, 477 So.2d 1026 (Fla 2d DCA 1985).

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MCC's assertion that the CISG's legislative history shows that inclusion of the parol evidence rule was considered but rejected (Br. In Opp. 16-18) is simply incorrect. In support of this assertion, MCC quotes misleadingly and incompletely from the article by David H. Moore, *op. cit.*, 1995 Brigham Young L. Rev. 1347. MCC fails to quote the following sentences from Moore's article:

> "[T]he limitation on testimony proffered by the Canadian representative was triggered by the mere existence of a writing....Because the U.S. parol evidence rule, in contrast, is triggered by the integrationist intent of the parties, that rule was not explicitly rejected by the Committee along with the Canadian proposal." *Id.*.

Moore notes that the legislative history and language of CISG Article 8 indicate that the parol evidence rule may well be viewed as consistent with Article 8. *Id.*, at 1360. Early in its formulation, the future article 8(3) read:

> "The intent of the parties or the intent a reasonable person would have had in the same circumstances ... [may] [is to] be determined in light of the circumstances of the case including the [preliminary] negotiations, any practices which the parties have established between themselves, any conduct of the parties subsequent to the conclusion of the contract, usages ... *and any applicable legal rules for contracts of sale*." (Emphasis added).

Moore notes that the italicized clause may have accommodated application of the parol evidence rule in determining

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Curiously, MCC further relies on Silingardi's affidavit which asserts that "[u]nder Italian trade practice, the terms on the reverse of a Proposta form are not applicable unless specifically included by hand-written reference on the face of the form." However, the order forms which Monzon signed do exactly that. By affixing his signature immediately beneath the clause on the front of the proposals which states that the buyer is aware of the sales conditions on the reverse and expressly assents to them, Monzon specifically incorporated the terms on the reverse of the forms into the agreement. See Appendix to Petition, p.60a.

the subjective or objective intent of the parties, as the parol evidence rule is a legal rule that applies to contracts generally and is made applicable to "contracts of sale" specifically through section 2-202 of the U.C.C. As Article 8 evolved, the clause was deleted, not because it was inconsistent with the principles of Article 8, but because it was deemed "unnecessary". *Id.*, at 1360-1. Moore concludes that the continued applicability of legal rules relating to sales contracts, such as the parol evidence rule, may thus have seemed apparent to the Working Group. *Id.*, at 1361.

MCC claims that the application of a "domestic" principle of law such as the parol evidence rule would be inconsistent with the uniformity goal stated in CISG Article 7(1) (Br. In Opp. 14, 19-20). That a rule is purportedly of domestic origin, however, is not reason enough to reject it. Professor Fletchner notes that "The CISG does not attempt to provide rules for every legal issue that can arise in an international sales transaction." Fletchner, *op. cit.*, at 198. In some instances, references to domestic national law are implied. *Id.*, at 199. Article 7(2) establishes an express methodology for determining when to make implied references to national law, by providing that questions not expressly settled in the Convention are first to be answered by references to the "general principles" of the CISG and then, "in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law." As an example, Fletchner notes that the interest rate payable under Article 78 -- a matter not expressly dealt with in the Convention -- is generally held to be governed by applicable national law. Id.

Application of the parol evidence rule to the CISG promotes international uniformity and satisfies the demands of Article 7(1). First, the parol evidence rule requires the judge, not the jury, to determine, at least initially, the effect the parties intended for their writing, thus bringing U.S. courts into greater procedural harmony with courts of the vast majority of legal systems throughout the world which assign the interpretation of contracts solely to judges. Moore, *op. cit.*, at 1365-1366. In addition, because judges are more likely than juries to consider the international character of the CISG, the rule increases the likelihood that U.S. courts will reach more internationally uniform results. *Id.*, at 1366.

Those interpreting the CISG are charged to bear in mind "the need to promote...the observance of good faith in international trade." Good faith and stability of contractual terms are not furthered by acceptance of purported oral evidence which flatly contradicts the written agreement. There is nothing in Article 7(1) to suggest that promoting uniform results is to be given precedence over promoting good faith. Fletchner, *op. cit.*, at 205. The parol evidence rule promotes the observance of good faith by preventing parties from entering final, exclusive agreements and then seeking to escape or unilaterally alter unfavorable terms by pleading in bad faith the existence of prior or contemporaneous contradictory oral terms. Moore, *op. cit.*, at 1370. Thus, the parol evidence rule, even if "domestic" in origin, may legitimately be applied under the CISG.

This Court should grant certiorari to resolve the conflict among the Circuit Court of Appeals with respect to the interpretation of this international treaty. As the world's premier trading partner, this Nation will undoubtedly be the forum of much litigation involving the CISG, and parol evidence issues will frequently recur. Further, the Courts of other nations will look to judicial decisions from the United States as an aide in interpreting the treaty. The current state of our law, with two federal Courts of Appeals reaching directly opposite conclusions with respect to this key interpretation issue, is a circumstance which this Court should address.

CONCLUSION

The writ of certiorari should be granted.

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